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Record No. 96-651

In The Supreme Court of the United States

October Term 1996

JAMES E. GILBERT,
Petitioner,

v.

RICHARD J. HOMAR,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION AS *AMICUS CURIAE*

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QUESTION PRESENTED

1. Whether the Fourteenth Amendment's Due Process Clause requires that a public employee be afforded procedural due process protection before imposing a suspension of employment which causes substantial, stigmatizing and permanent career and other adverse affects and injuries?

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BRIEF OF THE SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION AS *AMICUS CURIAE*

INTEREST OF THE AMICUS CURIAE

The Southern States Police Benevolent Association (hereafter SSPBA) is a non-profit association comprised of over twenty thousand law enforcement officers and related public employees in eleven states. SSPBA and its state affiliates engage in various types of advocacy, lobbying, litigation and scientific analyses of various law enforcement issues. SSPBA

promotes improved law enforcement and constitutional protection for everyone.

SSPBA and its members are vitally interested in the grave constitutional issues before this Court. Law enforcement officers are frequently victims of constitutional torts, often in the employment context. In the experience of SSPBA, law enforcement officers are frequently subjected to constitutional deprivations and other workplace injuries that adversely affects the delivery of police services and the public safety. SSPBA has litigated a number of cases involving similar issues of procedural due process. SSPBA accordingly submits this brief to assist this Court in its resolution of this important case.[1]

STATEMENT OF THE CASE

Amici adopt the Statement of the Case and Facts as presented by Respondent.

SUMMARY OF ARGUMENT

Law enforcement officers are constitutionally entitled to procedural due process when they are suspended without pay because a suspension is a substantial, as opposed to a de minimis, constitutional deprivation. As America approaches a new century, complaints against law enforcement officers continue to skyrocket. Some are legitimate, however many are not. Many of those complaints represent nothing more than angry citizens who have had an unpleasant encounter with an

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[1] The parties have consented to the filing of this brief amicus curiae. Letters indicating their consent have been filed with the Clerk of Court.

officer. In many such encounters, law enforcement officers are verbally abused, spit on, harassed, assaulted, battered, stabbed, shot and sometimes killed.

Officers need predeprivation procedural protection before suspensions because pre-suspension hearings often demonstrate the falsity of allegations against officers and therefore avoids the imposition of unjust punishment. Post-deprivation process is not adequate because even full awards of backpay cannot repair the permanent damage inflicted upon officers who are permanently stigmatized with a suspension. Even if the suspension is reversed, most agencies retain records of the suspension and the officer must disclose even a reversed suspension to future prospective employers. In *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985), this Court held that the Due Process Clause entitles an employee to a hearing "before he [or she] is deprived of any significant property interest..." A suspension constitutes such a significant deprivation.

Pre-suspension procedural due process can often be conducted in a matter of minutes. The benefits to officers, their employers and the public far outweigh any conceivable administrative burdens associated with suspension hearings. Affording presuspension due process is simple, without significant burden, but vitally important in the scheme of constitutional protection for law enforcement officers who are subjected to daily risks of death for their public service. The constitutional balance should be struck in favor of presuspension due process because the constitutional rights of law enforcement officers "must be afforded great weight." *Konraith v. Williquette*, 732 F. Supp. 973, 978 (W.D. Wis. 1990).

I. UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, PUBLIC EMPLOYEES ARE ENTITLED TO PROCEDURAL DUE PROCESS WHEN THEY ARE SUSPENDED WITHOUT PAY BECAUSE A SUSPENSION CONSTITUTES A CONSTITUTIONAL DEPRIVATION

> Law enforcement officers are not relegated to a "watered down version of constitutional rights." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).
>
> "The history of liberty has largely been the history of observance of procedural safeguards." *McNabb v. U.S.*, 318 U.S. 332, 347 (1947).

Procedural due process rights are particularly important because procedural due process is often the only non-litigation check on an erroneous personnel decision that may ruin the career of a law enforcement officer. The essence of procedural due process "reflects a fundamental value in our American constitutional system." *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971). Essentially, procedural due process requires that a meaningful predeprivation opportunity to be heard must be afforded to a public employee who has a property or liberty interest in his or her employment. *Cleveland Board of Ed. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).[2] "In America, with the object of preventing an arbitrary government, procedural safeguards were guaranteed to all persons by the inclusion of due process clauses..." *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988).

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[2] See Friendly, *"Some Kind Of Hearing,"* 123 U.Pa. L. Rev. 1267 (1975); *Developments In The Law of Public Employment*, 97 Harv. L. Rev. 1611, 1780 - 1800 (1984).

As explained in *Daniels v. Williams*, 474 U.S. 327, 331 (1986), the touchstone of due process involves "protection of the individual against arbitrary action of government..." "This history reflects the traditional and common sense notion that the due process clause, like its forbear in the Magna Carta... was intended to secure the individual from the arbitrary exercise of the powers of government," quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884).

A. The Rationale For Procedural Due Process Protections

The laws governing law enforcement employment relations profoundly affects the efficiency and quality of law enforcement services and the daily lives of officers everywhere. Law enforcement agencies, officers and the public are better served by meaningful predeprivation procedural due process protections for officers. Procedural due process protection safeguards against mistakes and errors which can deprive an officer of his or her entire career including the well being of the officer's entire family. Similarly, an erroneous decision can deprive the agency of a good officer. With the tremendous cost of properly training new officers, it makes sound economic sense to afford presuspension due process to officers as many officers will likely be saved from arbitrary and erroneous adverse employment action.

Presuspension due process promotes efficiency in the workplace. It promotes employee confidence and positive morale. This in turn leads to valuable benefits for everyone. A positively motivated law enforcement workforce breeds an environment of collegiality, efficiency and esprit de corps. Without presuspension due process, erroneous decisions go unchecked. Denials of due process frustrate the entire system by demoralizing valuable officers and rewarding abusive management officials for their own misconduct. The presuspension procedural due process sought by Richard Homar would tend to negate these ill effects.

As government has grown, so has the power of governmental employers.[3] Americans from all walks of life need constitutional protection from increasingly arbitrary and oppressive government power, more often at the local level.[4] Contemporary law enforcement bureaucracies present vast opportunities for abusive bureaucrats to employ retaliatory tactics on personal missions of retaliation.[5] The tremendous volume of reported cases adjudicating the rights of law enforcement officers demonstrate the frequency and intensity of workplace related harassment of law enforcement officers.[6]

Imagine working for a bureaucrat who could suspend you at whim, whether based on false allegations, mere rumor or based upon absolutely nothing at all. Without presuspension procedural due process, law enforcement officers are often left with this nightmare.

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[3] Millions of individuals are employed by more than eighty two thousand governmental units at local, state, and federal levels. As of 1991, more than 18 million persons were employed by local, state or the federal government. See *Waters v. Churchill*, 114 S.Ct. 1878, 1899 n. 3 (1994)(Stevens, J. and Blackmun, J., dissenting)(citing the 1991 figures from the U.S. Department of Commerce Statistical Abstract of the United States, Table No. 500, page 318 (113 ed. 1993).

[4] See Senator Sam J. Ervin, Jr., *Preserving The Constitution* 165, 213 - 214 (1984); Boward, *Lost Rights: The Destruction of American Liberty* 1-6, 49 - 51 (1995). See generally McGuinness, *Equal Protection For Non-Suspect Class Victims of Governmental Misconduct: Theory and Proof of Disparate Treatment and Arbitrariness Claims*, 18 Campbell L. Rev. (1997).

[5] See *Board of County Commissioners v. Umbehr*, 116 S.Ct. 2342, 2347 (1996)(cataloging cases of government retaliation in different contexts); McGuinness, *Equal Protection For Non-Suspect Class Victims of Governmental Misconduct: Theory and Proof of Disparate Treatment and Arbitrariness Claims*, 18 Campbell L. Rev. (1997).

[6] See Levinson, *Silencing Government Employee Whistleblowers In The Name of "Efficiency"*, 23 Ohio Northern U. L. Rev. 17 (1996)(cataloging numerous cases demonstrating retaliation against police officers).

The critical importance of procedural due process protections has long been emphasized. Many cases have "recognize[ed] and respect[ed] the role that procedural due process has played in preventing arbitrary deprivations of individual liberty and property..."[7] This logic, underscored by such historic decisions from this Court as *Loudermill*, *McGrath* and *McNabb*, demonstrate the importance of the time honored American tradition of procedural due process protection. Recognizing this historic protection in the context of employee suspensions is logical and necessary.

In recent years, this Court has emphasized a flexible procedural due process approach whereby a balancing test is employed on a case-by-case basis to determine what particular process is due in a given situation. *Matthews v. Eldridge*, 424 U.S. 319 (1976). The precise requirements of procedural due process depend upon the particular circumstances, *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), but the essential fundamentals remain constant.

The right to presuspension due process is so fundamental and so necessary that it should be a standard component in any law enforcement employment case unless there is an admission of misconduct by the employee that would unequivocally justify the suspension and the punishment imposed. Where there are disputed facts and contested positions, the predeprivation process is necessary in order to eliminate an officer from suffering a wrongful suspension of employment.

B. The *Loudermill* Standard Is Applicable To Suspensions

Over a decade ago in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), this Court provided additional guidance as to what predeprivation process must be afforded a public employee. In *Loudermill*, this Court held that at the predeprivation stage, "[t]he tenured public employee is

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[7] *Fields v. Durham*, 909 F.2d 94, 99 (4th Cir. 1990).

entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." Applying this settled standard to suspensions is logical and simple.

Loudermill established a two-stage procedure for minimum predeprivation process combined with a full post-deprivation hearing. *Garraghty v. Comm. of Va.*, 52 F.2d 1274, 1283 (4th Cir. 1995). First, a minimum predeprivation process must be provided before any adverse action can be taken. Second, a full post-deprivation hearing must be provided.[8] This recognition of "stages" of due process underscores the importance and fundamental nature of predeprivation process.

Loudermill recognized that there are some emergency situations in which a post-deprivation hearing may suffice,[9] although it appears that such an emergency situation will rarely exist in an employment setting. The emergency doctrine would continue to apply. In prior cases, the Court has invalidated state statutes which deprived individuals of property interests without predeprivation notice and hearing, even though the state offered post-deprivation procedures which could ultimately restore the property interests.[10] This Court has held that absent "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event," the government must provide the hearing before the deprivation takes place. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 114 S.Ct. 492, 501 (1993); *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1099 (6th Cir. 1996).

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[8] *Garraghty v. Comm. of Va.*, 52 F.3d 1274, 1283 (4th Cir. 1995); *Contoir v. University of Maine*, 35 F.3d 6, 12 -13 (1st Cir. 1994).

[9] *FDIC v. Mallen*, 486 U.S. 230, 240 (1988); *Ewing v. Mytinger & Cassleberry*, Inc.; 339 U.S. 594 (1950); *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908). See *Parrett v. Taylor*, 451 U.S. 527, 539 (1981).

[10] *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 19-20 & n.26 (1978); *Snidach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Southern Railway Co. v. Virginia*, 290 U.S. 190 (1933).

In *Loudermill*, this Court held that the Due Process Clause entitles an employee to a hearing "*before* he [or she] is deprived of any significant property interest..." 470 U.S. at 542. The Third Circuit below correctly recognized this principle. There is no significant distinction between suspensions and terminations for purposes of procedural due process analysis.

II. A SUSPENSION OF EMPLOYMENT CAUSES SEVERAL TYPES OF SUBSTANTIAL HARM INCLUDING PERMANENT STIGMATIZING ADVERSE AFFECTS ON THE EMPLOYMENT'S CAREER THEREFORE REQUIRING DUE PROCESS PROTECTION

"A deprivation of constitutional dimensions occurs when the state stops the flow of benefits associated with a protected interest for any appreciable length of time." *D'Aquisto*, 640 F.Supp. at 609, citing *Memphis Light v. Craft*, 436 U.S. 1, 20 (1978). This Court has held that any interruption of the flow of benefits constitutes a deprivation. *Atkins v. Parker*, 472 U.S. 115, 128 n.31 (1985).

A suspension of employment typically causes devastating consequences to public employees. In addition to the monetary losses and consequences thereof, other protectable interests are also invaded. See *Homar v. Gilbert*, 89 F.3d at 1018 n. 7 (honor and respect of service). In *FDIC v. Mallen*, 486 U.S. 230, 240, 100 L.Ed. 2d 265 (1988), this Court recognized that a bank president's interest in the right "to continue to serve as president of the bank and to participate in the conduct of its affairs is a property right protected by the Fifth Amendment Due Process Clause." To be sure, law enforcement officers possess equal rights as compared with bank presidents.

A suspension of employment typically causes unique and particular injuries to law enforcement officers. A suspension becomes a permanent part of an officer's history, which re-

mains for his or her entire career. Even if the suspension is set aside, it remains as a part of the officer's history and the officer has to disclose that to all future prospective employers. Typically, suspensions are required to be made public. See, e.g., N.C.G.S. 160A-168.

Most states have law enforcement certification agencies that maintain complete records of the certification and training of officers. E.g. N.C. Gen. Stat. ch. 17C-3; 17C-6, and administrative code of regulations, 12 N.C. Administrative Code. Thorough background investigations are typically required as officers move or attempt to change employment. See N.C. Administrative Code, section .0102. Forms are used which require officers to report all suspensions of employment, whether reversed or not.

A suspension is a "red flag" that will often, in and of itself, cause a prospective employer to eliminate an applicant. A suspension constitutes a direct attack on the officer's integrity. A suspension carries a badge of unprofessionalism in an occupational field where professionalism is an all important characteristic. Once a suspension is entered into an officer's personnel record, it flags the officer for all future prospective employers to consider. Many law enforcement employers weed out applicants who have such "black marks" as suspensions on their record, without digging behind the surface of the marks. All of this amounts to a substantial constitutional injury because the officer's occupational liberty is at stake. Law enforcement is a unique profession and occupational field where a suspension will haunt an officer forever.

III. THE WEIGHT OF AUTHORITY HOLDS THAT SUSPENSIONS ARE SUBSTANTIAL INJURIES THAT REQUIRE PREDEPRIVATION DUE PROCESS

The leading treatises recognize that "procedural due process applies in cases of discharge from employment, **temporary**

suspensions without pay, demotions, where employees are involuntary retired for a disability or are placed on an unpaid leave of absence for medical or psychological reasons..." Atchison, *The Rights of Law Enforcement Officers* 171 (3rd ed. 1996)(emphasis added); Silver, 2 *Public Employee Discharge and Discipline* section 17.9 at 318 - 19 (2nd ed. 1995).

"Temporary suspensions without pay are not de minimis and impinge on property interests." *Id.* quoting *Bailey v. Kirk*, 777 F.2d 567, 575 (10th Cir. 1985)(four day suspension of chief triggered predeprivation procedural due process); *Muscare v. Quinn*, 520 F.2d 1212, 1215 (7th Cir. 1975); *Thurston v. Deckle*, 531 F.2d 1264, 1273 (5th Cir. 1976), vacated on other grounds, 438 U.S. 901 (1978); *Golbeck v. City of Chicago*, 782 F. Supp. 381, 385 (N.D. Ill. 1992) *D'Acquisto v. Washington*, 640 F. Supp. 594, 609-10 (N.D. Ill. 1986); *Hopkins v. Mayor*, 600 F. Supp. 542, 547 (D. Del. 1984). In *Garraghty v. Jordan*, 830 F.2d 1295, 1299 (4th Cir. 1987), the Fourth Circuit held that a five day suspension of employment triggered procedural due process protection:

> We find that Garraghty's temporary suspension, though lasting only five days, was not a de minimis deprivation, for with that suspension he lost compensation and other emoluments of the office for the period of the suspension.

See *Click v. Board*, 609 F.Supp. 1199 (W.D.Mo. 1985)(three day suspension held not de minimis); *Best v. Boswell*, 696 F.2d 1282, 1289-90 (11th Cir. 1983)(two week suspension impinges property interest); *Louise v. Coluatti*, 606 F.2d 392, 401-02 (3rd Cir. 1979); *Brunn v. City of Cleveland*, 526 F.Supp. 564, 565-66 (N.D. Ohio 1981), aff'd 810 F.2d 199 (6th Cir. 1986). These and other cases consistently hold that temporary suspension from employment without pay triggers procedural due process protection as the Third Circuit held in this case.

IV. THIS COURT'S OPINION IN *GOSS V. LOPEZ*, A SCHOOL SUSPENSION CASE, HELD THAT AS LONG AS A PROPERTY DEPRIVATION IS NOT DE MINIMIS, THE DUE PROCESS CLAUSE APPLIES.

In *Goss v. Lopez*, 419 U.S. 565, 576, 579 (1975), this Court held that "the length and consequent severity of the deprivation... is not decisive of the basic right to a hearing of some kind," citing *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972). *Goss* involved a student suspension from high school for ten days without any pre-deprivation hearing. This Court held that the ten day suspension from school constituted a sufficient deprivation to trigger procedural due process protection. *Goss* further observed that as long as the deprivation is not de minimis, the gravity of the deprivation is irrelevant. 419 U.S. at 576. A number of the leading circuit court cases addressing the issue of whether or not an employment suspension triggers procedural due process protection relies upon this court's holding and rationale in *Goss*. See *Muscare*, 520 F.2d at 1215; *Garraghty*, 830 F.2d at 1299.

While an erroneous school suspension is serious, a wrongful suspension of employment subjects public employees to more grave deprivations including risks to their very subsistence. In *Muscare*, the Seventh Circuit held that "not only are alleged transgressions justifying suspension [of public employees] more serious than school discipline problems, but the corresponding penalties are potentially more damaging, for reputations, careers, and substantial amounts of pay are at stake." 520 F.2d at 1215. The court further observed that a twenty nine day suspension with loss of fourteen hundred dollars "can be disastrous to many civil servants." Id at n. 3 Here, Homar was subjected to a similar suspension of thirty days. For most law enforcement officers who are required to live from paycheck to paycheck, a thirty day suspension is tantamount to termination. With a suspension of the magnitude suffered by Richard Homar, many law enforcement officers would incur

repossessions because of the extremely low salaries paid to most law enforcement officers.

V. A SUSPENSION OF EMPLOYMENT DEPRIVES AN EMPLOYEE OF SALARY WHICH IS A CONSTITUTIONALLY PROTECTED INTEREST.

A. *Sniadach v. Family Finance*: Wages Are A Specie Of Property

As a form of substantial monetary compensation, salary constitutes property within the meaning of the Due Process Clause. In *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), this Court construed Wisconsin's pre-judgment garnishment of wages procedure. The garnishment procedure provided that wages would be frozen based upon issuance of a summons at the request of the creditor's lawyer. This Court held that the deprivation of wages, without notice and prior hearing, violated fundamental principles of procedural due process.[11] *Sniadach* implicitly recognized that pay or wages constitutes property for purposes of procedural due process protection. *Cf. Parratt v. Taylor*, 451 U.S. 527, 68 L.Ed.2d 420 (1981), where the Court held that a prisoner's hobby kit valued at $23.50 constituted property for purposes of due process protection. To be sure, Homar's interest in not being suspended from his job is as constitutionally worthy as a prisoner's hobby kit.

In *Orloff v. Cleland*, 708 F.2d 372, 378 (9th Cir. 1983), the court held that "it is obvious that Orloff had a property interest in his salary," citing *Sniadach*. There, the government took unilateral deduction from the plaintiff's paycheck without any hearing. In *Board of Regents v. Roth*, 408 U.S. 564, 571-77

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[11] See *Begg v. Moffitt*, 555 F. Supp. 1344, 1349 (N.D. Ill. 1983)(longevity pay of police officers held to constitute a protected property interest).

(1972), this Court defined both property and liberty in the public employment context:

> Liberty and property are broad and majestic terms. They are among the great constitutional concepts... purposely left together meaning from experience... they relate to the whole domain of social and economic fact... it is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined... property interests... are created and their dimensions are defined by existing rules or understandings...

Roth's definition of property and liberty for purposes of interests in public employment encompasses suspensions as a form of deprivation.

VI. THIS COURT'S OPINION IN *RUTAN V. REPUBLICAN PARTY* HELD THAT ADVERSE EMPLOYMENT ACTION LESS THAN TERMINATION WAS CONSTITUTIONALLY ACTIONABLE AND THEREFORE SUPPORTS RECOGNITION OF DUE PROCESS PROTECTION FOR A SUSPENSION.

In *Rutan v. Republican Party*, 497 U.S. 62, 111 L.Ed. 2d 52 (1990), this Court held that various job related adverse action was constitutionally actionable. *Rutan* involved issues of whether hiring, promotion, transfer and recall from layoff decisions were constitutionally actionable. *Rutan* was grounded in First Amendment doctrine, however, that analysis is similarly applicable under the Fourteenth Amendment. There is no analytical distinction in deprivations under the First and Fourteenth Amendments. Other cases have demonstrated how de-

motions, diminished responsibilities or campaigns of petty harassment can trigger constitutional protection. E.g., *Smith v. Fruin*, 28 F.3d 646, 649 n. 3 (7th Cir. 1994).

CONCLUSION

> "It is procedure that spells much of the difference between the rule by law and rule by whim or caprice." *Joint Anti-Facist Committee v. McGrath*, 341 U.S. 123, 179 (1951)(Douglas, J. concurring).

> "[T]oo often law enforcement officers lose their jobs for frivolous reasons - or for no reason at all." Senator Jesse Helms, Congressional Record, January 31, 1991.

WHEREFORE, for the reasons stated herein and in Respondent's brief, this Court should affirm the decision below.

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